STATE OF MICHIGAN

COURT OF APPEALS

RANDY A. HOWARD,

Plaintiff-Appellee,

v

FORD MOTOR COMPANY and MADELINE EASON,

Defendants-Appellants.

UNPUBLISHED
January 7, 2010

Nos. 285802; 288087
Wayne Circuit Court
LC No. 07-727144-CD

Before: Fort Hood, P.J., and Sawyer and Donofrio, JJ.

PER CURIAM.

In this consolidated interlocutory appeal, defendants appeal by leave granted from the trial court's May 16, 2008, order denying their motion in limine to strike plaintiff's claims for non-economic damages or to compel a mental exam, and from the trial court's October 1, 2008, order denying their motion for summary disposition. We reverse.

I

Defendants first argue that the trial court improperly denied summary disposition because plaintiff failed to present a *prima facie* case of retaliation under the Michigan Civil Rights Act (CRA) relating to his July 2006 discharge. Defendants state that plaintiff failed to satisfy the second *prima facie* element because he did not show that the protected activity was known to Ford's decision-maker in the July 2006 discharge. We agree.

This Court reviews de novo the decision on a summary disposition motion. See *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In considering a motion pursuant to MCR 2.116(C)(10), a court considers affidavits, pleadings, depositions, admissions and other evidence submitted by the parties in a light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999), reh den 461 Mich 1206 (1999). Where proffered evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Id.* at 120. A litigant's mere pledge to establish at trial that a genuine issue of material fact exists is not sufficient to overcome summary disposition. *Id.*

A *prima facie* case of retaliation under the CRA requires: (1) that the plaintiff engaged in a protected activity, (2) that this was known by the defendant, (3) that the defendant took an

employment action adverse to the plaintiff, and (4) that there was a causal connection between the protected activity and the adverse employment action. *Meyer v City of Center Line*, 245 Mich App 560, 568-569; 619 NW2d 182 (2000).

Plaintiff argues that "the evidence belies the defendants' assertion and shows that Defendant Eason was clearly part of the termination decision." Assuming plaintiff engaged in a protected activity to defendant Eason, no evidence was presented on the record showing that defendant Eason was the decision-maker in his firing. Nor did plaintiff present evidence on the record that the decision-makers involved in plaintiff's firing knew of the "protected activity." Without presenting any evidence to establish a genuine issue of material fact towards the second *prima facie* element of retaliation, defendants were entitled to summary disposition as a matter of law regarding this claim. *Maiden, supra.*

II

Defendants next argue that they are entitled to summary disposition of plaintiff's failure-to-promote claims because he does not present any evidence that establishes a prima facie case. Specifically, that plaintiff ignored the requirements to show a *prima facie* case of his claims set forth in *Hazle v Ford Motor Co*, 464 Mich 456, 467; 628 NW2d 515 (2001), and that plaintiff did not establish who were the decision-makers, how he was qualified, and how those decisions gave rise to an inference of discrimination. We agree.

In *Hazle, supra* at 467, the Michigan Supreme Court held that in order to establish a prima facie case of failure-to-promote discrimination, plaintiff was required to present admissible evidence that (1) she belongs to a protected class, (2) she suffered an adverse employment action, (3) she was qualified for the position, and (4) the job was given to another person under circumstances giving rise to an inference of unlawful discrimination.

Plaintiff in his summary disposition brief does not support certain elements of his failure-to-promote claim with facts or evidence to support a genuine issue of material fact. Instead, plaintiff lists facts that may or may not be considered admissible evidence and moves into an analysis of how defendants have not offered an explanation for his non-promotion. Even if all of plaintiff's evidence is considered to be admissible, he did not show how this evidence supports these two prima facie elements of his failure-to-promote claim. Plaintiff does not show how he was qualified for these positions. Nor does plaintiff describe how the evidence he lists gives rise to an inference of discrimination. Therefore, his failure to promote claims should not have precluded summary disposition.

III

Defendants next argue that plaintiff could not establish a genuine issue of fact for the fourth element, a causal connection between the protected activity and the adverse employment action, *Meyer, supra* at 568-569, of a *prima facie* case of retaliation under the CRA regarding plaintiff's October 2007 discharge. We agree.

Plaintiff offers no evidence to establish a genuine issue of material fact concerning this element. Instead, plaintiff merely asserts that there is "overwhelming evidence to show retaliation for filing his lawsuits," without identifying any evidence that the protected activity

factored in the adverse employment action. At best, plaintiff has shown nothing more than a coincidence in time between the protected activity and the employment action.

IV

Defendants next argue that plaintiff failed to show a genuine issue of material fact as to his Persons with Disabilities Civil Rights Act (PWDCRA) claim because plaintiff failed to show any disability-based animus on the part of Ford. We agree.

The PWDCRA provides that an employer may not, "[d]ischarge or otherwise discriminate against an individual with respect to compensation or the terms, conditions, or privileges of employment, because of a disability or genetic information that is unrelated to the individual's ability to perform the duties of a particular job or position." MCL 37.1202(1)(b). To establish a prima facie case of discrimination under the PWDCRA, a plaintiff must show that: (1) he is disabled as defined under the act; (2) the disability is unrelated to his ability to perform the duties of a particular job; and (3) he has been discriminated against in one of the ways set forth in the act. *Peden v City of Detroit*, 470 Mich 195, 204-205; 680 NW2d 857 (2004).

"The shifting burdens of proof described in *McDonnell Douglas* [*Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973)], are not applicable if a plaintiff can cite direct evidence of unlawful discrimination." *Debrow v 21st Century Great Lakes, Inc*, 463 Mich 534, 539; 620 NW2d 836 (2001). In *Debrow*, the plaintiff filed an age discrimination and wrongful discharge suit after he was removed from his executive position in the Century 21 Real Estate Network. *Id.* at 536. During the conversation in which the plaintiff was fired, his supervisor said to him "he was getting too old for this shit." *Id.* at 538.

The Court held that this admission is direct evidence of unlawful age discrimination. *Id.* at 539. The Court reasoned that the remark was made during the conversation in which the plaintiff's superior informed him that he was being fired. *Id.* Considered in the light most favorable to the plaintiff, this remark could be taken as a literal statement that the plaintiff was "getting too old" for his job and this was a factor in the decision to remove him from his position. *Id.*

In our case, plaintiff considers the admission from one of Ford's agents that, "he (plaintiff) would be an LL5 (higher employment position) if not for his hands," to be direct evidence of unlawful disability discrimination. However, this statement is substantially different from the statement made by the defendant in *Debrow*. The *Debrow* statement was made during the process of firing the plaintiff from his position by his supervisor. In the case at bar, there is a three-year time period between the statement and plaintiff's firing. Moreover, the person who made the statement did not participate in the decision to fire plaintiff, nor was he plaintiff's supervisor at the time of his firing. This statement does not lead to the conclusion that, if believed, shows that unlawful discrimination was at least a motivating factor in the employer's actions as the defendant's statement did in *Debrow*. In our case, the statement could mean many different things and did not seem to impact the decision to terminate plaintiff. It is not direct evidence that would alone automatically preclude summary disposition.

Meanwhile, there is little other evidence in the record that shows that plaintiff was discharged because of his disability (Marfan's syndrome). Plaintiff automatically assumes that

this admission is direct evidence, and moves on to analyze case law that shows that direct evidence alone precludes summary disposition. But plaintiff does not make any other showing of discrimination under the PWDCRA to establish a genuine issue of material fact. As a result, Plaintiff has not provided sufficient evidence to meet the third element required under the PWDCRA to survive summary disposition.

V

Defendant Eason argues that plaintiff failed to establish a genuine issue of material fact over his claim of tortious interference with a business relationship or expectancy. Meanwhile, Eason also argues that plaintiff failed to establish a genuine issue of material fact for his claim of violation of public policy. Defendants state that plaintiff's claim does not meet the standard set forth in *Suchodolski v Michigan Consolidated Gas Co*, 412 Mich 692; 316 NW2d 710 (1982). We agree.

The elements of a cause of action for tortious interference with a business relationship or expectancy are: 1) a valid business relationship existed; 2) the alleged interferer knew of the relationship; 3) the interference was intentional and caused a breach or termination of the relationship; and 4) the plaintiff was damaged as a result. *Mino v Cilo School Dist*, 255 Mich App 60, 78; 661 NW2d 586 (2003). The alleged interferer must be a third party to the business relationship and cannot be an agent of the employer who is acting within the scope of the agency. *Feaheny v Caldwell*, 175 Mich App 291, 305-307, 437 NW2d 358 (1989). Corporate agents are not liable for tortious interference with the corporation's contracts unless they acted solely for their own benefit with no benefit to the corporation. *Reed v Michigan Metro Girl Scout Council*, 201 Mich App 10, 13; 506 NW2d 231 (1993), citing *Bradley v Phillip Morris, Inc*, 194 Mich App 44, 50-51; 486 NW2d 48 (1992), and *Feaheny, supra* at 305-306.

Plaintiff offers little evidence to support his argument. Plaintiff instead states that the law is clear that a company manager or corporate officer will be considered a "third officer" to the employment relationship where she acts to further personal motives. Plaintiff offers no evidence that defendant acted to further her personal motives. Moreover, plaintiff does not offer evidence showing that the decision to terminate plaintiff was based on a process that involved defendant Eason. Plaintiff has not presented evidence establishing a genuine issue of material fact that precludes summary disposition of this claim.

Defendants also argue that plaintiff's public policy tort claims fail. The anti-retaliation provisions of these acts provide plaintiff's exclusive remedy for retaliatory employer conduct directed at claims made under them, and preempt any common-law "public policy" theory. *Dudewicz v Norris Schmid, Inc*, 443 Mich 68, 79-80; 503 NW2d 645 (1993); *Lewandowski v Nuclear Mgt Co*, 272 Mich App 120, 127; 724 NW2d 718 (2006) ("a [common law] public policy claim may only be sustained if there is no applicable statute prohibiting retaliatory discharge"); *Covell v Spengler*, 141 Mich App 76, 83-84; 366 NW2d 76 (1985). Furthermore, *Suchodolski, supra* at 692, explains that "public policy" is violated only when (a) a statute specifically prohibits the discharge, (b) the employee is discharged for refusing to violate the law, or (c) the employee is discharged for exercising a well-established statutory right.

Plaintiff again offers no evidence to show a genuine issue of fact for his public policy claim. Instead, plaintiff states in his analysis that the Elliott-Larsen Act and PWDCRA do not

prohibit retaliation against an employer for filing a tort claim, and thus a public policy claim is appropriate. Then plaintiff states that a jury could conclude from the evidence that defendants retaliated against Plaintiff for filing his tort claims. But plaintiff offers no evidence for his argument. Without evidence to support a genuine issue of material fact that plaintiff was fired in violation of public policy tort, he has not offered enough evidence to preclude summary disposition on this claim.

VI

Defendants next argue that plaintiff cannot establish a genuine issue of material fact for his third retaliation claim by not establishing a causal connection between the protected activity and the adverse employment action. *Meyer, supra.* We agree.

In this specific issue on appeal, plaintiff only argues that filing his first lawsuit constitutes protected activity, and defendants do not argue against that assertion. Beyond this argument, plaintiff states, "overwhelming evidence exists that defendants retaliated against him [plaintiff] for filing those claims (refusing to place him into a comparable job for 7 months, despite numerous LL6 job openings; offering him a job which would have required him to drive 40-50 miles each way; sticking him in a dead-end job at the Dearborn truck plant under punitive working conditions, and firing him within a few months over the 'bogus' degree issue, which was of Ford's own making)." Plaintiff does not present any evidence relating to how defendants made an adverse action or how a causal connection exists. Without any factual support to establish a genuine issue of material fact for a *prima facie* case of retaliation from plaintiff, defendants were entitled to summary disposition on this issue.

In light of our conclusion that defendants are entitled to summary disposition on plaintiff's claims, we need not address defendants' arguments regarding the mental examination request.

Reversed and remanded to the trial court with instructions to enter summary judgment in favor of defendants on all claims. We do not retain jurisdiction. Defendants may tax costs.

/s/ Karen M. Fort Hood
/s/ David H. Sawyer
/s/ Pat M. Donofrio